



Washington
Legal
Foundation

ANNUAL REPORT **2020**

Defending Economic Liberty Since 1977

“At a time when our nation’s free-enterprise system is facing many challenges, Washington Legal Foundation speaks with a powerful voice in helping to shape a legal and regulatory environment conducive to economic growth and prosperity for all people. Join me in supporting this dynamic organization, the talented team at WLF that provides leadership, and the engaged network of committed professionals across the country whose pro bono efforts contribute mightily to the important work of this remarkable foundation.”

Jay B. Stephens
Chairman
Legal Policy Advisory Board



Washington Legal Foundation is the nation’s premier public-interest law firm and policy center. Our mission is to preserve and defend America’s free-enterprise system by litigating, educating, and advocating for free-market principles, a limited and accountable government, individual and business civil liberties, and the rule of law. We **LITIGATE** precedent-setting issues before courts and regulatory agencies; **PUBLISH** and distribute timely and influential legal studies; and **COMMUNICATE** our message through webcast programs, blog commentary, editorials, and public education campaigns.



To our Friends and Supporters

Needless to say, 2020 was an unexpected and challenging year for all of us. The pandemic's disruption to our lives, our routines, and our work has been truly unprecedented. Like everyone else, Washington Legal Foundation moved into the virtual workspace and continued to press forward. Despite the many challenges posed by COVID-19, however, some things never change.

One of those is the need for WLF's unique voice and perspective. Simply put, there are no permanent victories in the battle against bad ideas. Elected officials, government regulators, trial lawyers, and activists appear to be more dedicated than ever to eroding free enterprise, economic liberty, and the rule of law. Very few organizations fight back. No group fights harder than WLF. In our nearly 44 years, we have litigated more than 1,540 court cases, participated in nearly 900 administrative and regulatory proceedings, and published close to 2,800 legal studies.

Even in a year plagued by turbulence, WLF's dedicated team proved remarkably resilient and productive. Our litigators filed briefs in 32 major cases in the Supreme Court, the federal courts of appeals, and state high courts. We saw positive decisions for, among many other things, the First Amendment (*Missouri Broadcasters Ass'n v. Taylor*), the separation of powers (*Seila Law v. CFPB*), and the rule of law (*Merck & Co. v. HHS*). WLF also submitted comments to federal agencies such as the FDA and the EPA. The topics addressed in these comments ranged from laboratory testing for likely gene-drug interactions to the membership of the EPA's Science Advisory Committee on Chemicals.

Once again, the quality of WLF's legal work was widely hailed. "WLF consistently submits top-flight briefs with distinct perspectives," one leading Supreme Court practitioner wrote: "Whenever I see a WLF brief, I know that it will be thoughtful and well written." In December 2020, another prominent

attorney favorably cited WLF's brief during oral argument before the Supreme Court in *Facebook v. Duguid*.

WLF also remained committed to publishing insightful content and distributed dozens of original papers authored by leaders in the legal community. Highlights include a *Legal Opinion Letter* by former FTC Chair Maureen Ohlhausen that cautions against the adventurous use of antitrust rules; and a *Legal Backgrounder* by the venerable Victor Schwartz on COVID-19 litigation risks. As always, the *WLF Legal Pulse* continues to provide timely and relevant legal commentaries on law and public policy. One *Legal Pulse* piece cautioning against overuse of the precautionary principle garnered more than 100,000 views at Forbes.com.

WLF continues to have an outsized presence in the media. In 2020, WLF was published, quoted, or discussed in Forbes, the Kansas City Star, the San Francisco Daily Journal, Bloomberg Law, SCOTUSblog, Capitol Forum, Overlawyered, Truth on the Market, Powerline, National Law Journal, Law360, the University Bookman, and many other outlets.

Although our in-person seminars ceased due to pandemic restrictions, we embraced virtual meetings and continued to host original and highly relevant programming. Panels of experts assessed the Supreme Court's October Term 2019 and previewed October Term 2020; discussed litigation aimed at environmental permits and the projects relying on those permits; previewed the *Google v. Oracle* oral argument; and instructed in-house and outside corporate counsel on strategic use of the First Amendment.

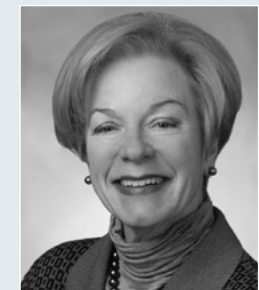
We've also added some new and familiar faces to our top-notch team. Sheila Brantley, our new Director of Development, brings a wealth of experience and has hit the ground running along with another key hire, Public Affairs and Development Assistant David

Collins. And WLF's new Senior Litigation Counsel, John Masslon, joined our team after a stint in the Solicitor General's Office of West Virginia; John interned at WLF as a Georgetown Law student back in 2009.

WLF's lawyers have the ear of prominent judges; its writers influence our policymakers; and its speakers drive our society's wider discussion. Every day, WLF promotes all areas of fundamental American values. We protect contractual and property rights. We oppose speech restrictions and excessive fines. We challenge vague laws and capricious regulatory mandates. In short, we defend liberty and due process.

In a year with so much uncertainty, we are grateful for the steadfast support and counsel of our Honorary Legal Policy Advisory Board Chairman, Jay Stephens, and to our entire board for their shared determination and encouragement.

Of course, we could not do any of the valuable work described in these pages without the support of our allies. Above all, we recognize and appreciate our many generous and civic-minded donors. Thank you for putting your faith in WLF. Rest assured that we are as determined as ever to defend free enterprise and secure our precious freedoms.



Constance Claffey Larcher
President and Chief Executive Officer

Pro Bono Law Firms

We thank the following law firms for the pro bono participation of their attorneys as participants in WLF *amicus* briefs, authors of publications and blog posts, and speakers in our programming.

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BakerHostetler

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Wilkinson Barker Knauer, LLP

Williams & Connolly LLP

"I'm always thrilled to have WLF's support at the Supreme Court. WLF's briefs are persuasive, rigorously researched, and bring an important free-enterprise perspective to every case."

*Sean Marotta
Partner
Hogan Lovells*



Legal Policy Advisory Board

In Memory of



The Honorable Dick Thornburgh

We mourn the passing of former Chairman of WLF's honorary Legal Policy Advisory Board, Dick Thornburgh. Dick served the public as Attorney General of the United States and two-term Governor of Pennsylvania. He was Chairman of WLF's advisory board from 1997 to 2015. Dick provided WLF invaluable support, counsel, and encouragement. We will miss our dear friend.

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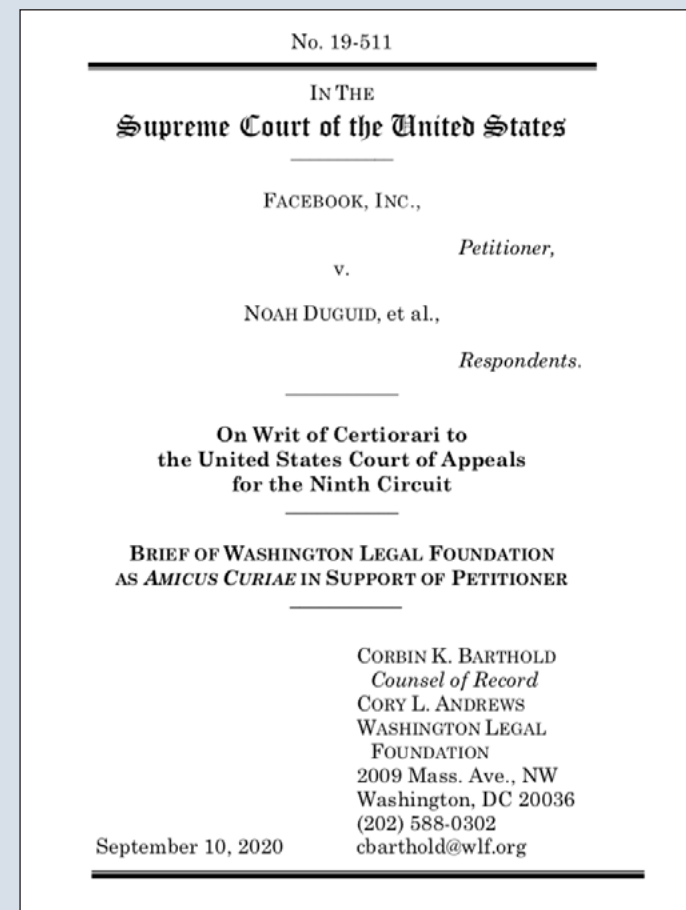
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Antonin Scalia Law School
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Litigating

Our litigation team rigorously monitors and intervenes in cases, actions, and complaints that threaten the fundamental rights of hard-working Americans and the integrity of the country's legal system. When government agencies interfere with those rights, WLF's litigation team does not hesitate to challenge those agencies in court.

Washington Legal Foundation litigates at every level of the judicial system, from local courts to the U.S. Supreme Court. WLF also regularly initiates, or intervenes in, administrative proceedings to promote regulatory reform.

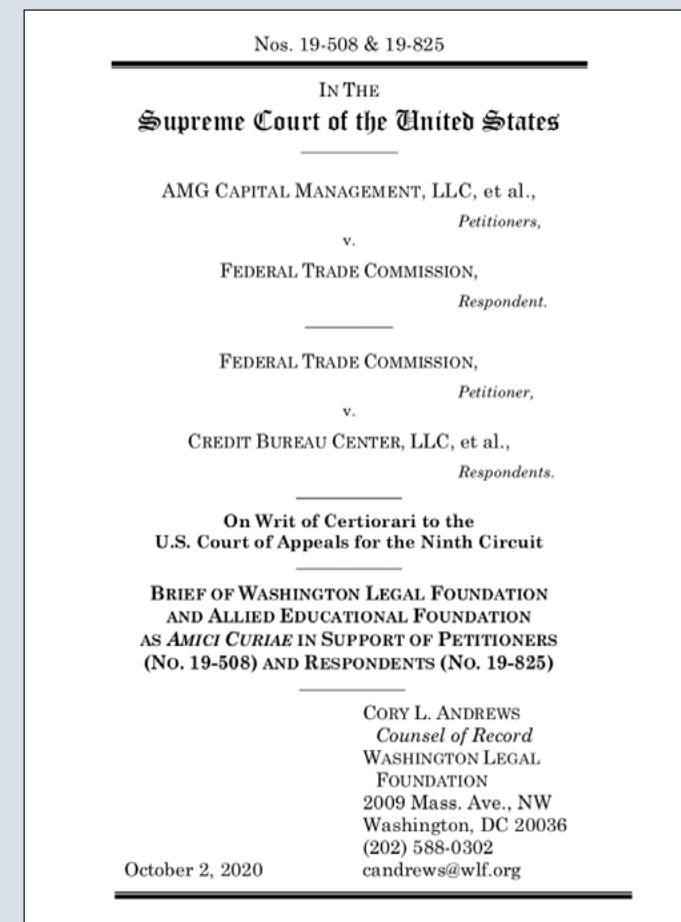
In 2020, WLF participated in or obtained outcomes in 68 court cases and regulatory proceedings. All of WLF's 2020 briefs and regulatory comments are available at WLF.org.



Facebook v. Duguid

Supporting Textualist Principles of
Statutory Interpretation

The Telephone Consumer Protection Act (TCPA) prohibits unsolicited phone calls made with “a random or sequential number generator.” Yet some courts have held that the TCPA also prohibits calls made with any device capable of storing a phone number and then dialing it. WLF argues that the TCPA’s plain words should govern. WLF’s brief was highlighted during oral argument in the Supreme Court by Kirkland & Ellis’s Paul Clement.



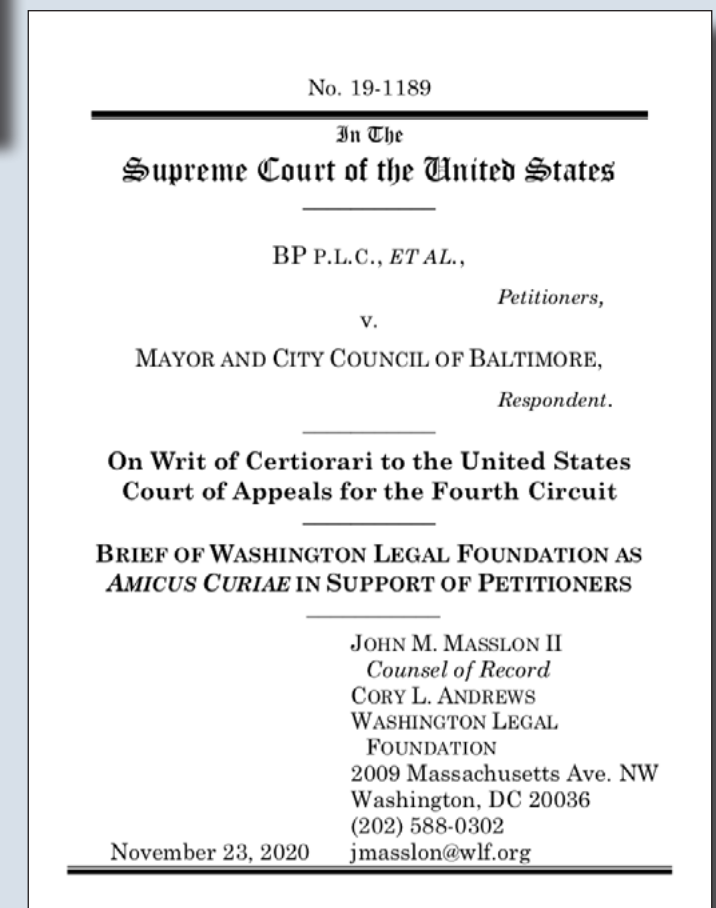
BP plc v. Mayor and City Council of Baltimore

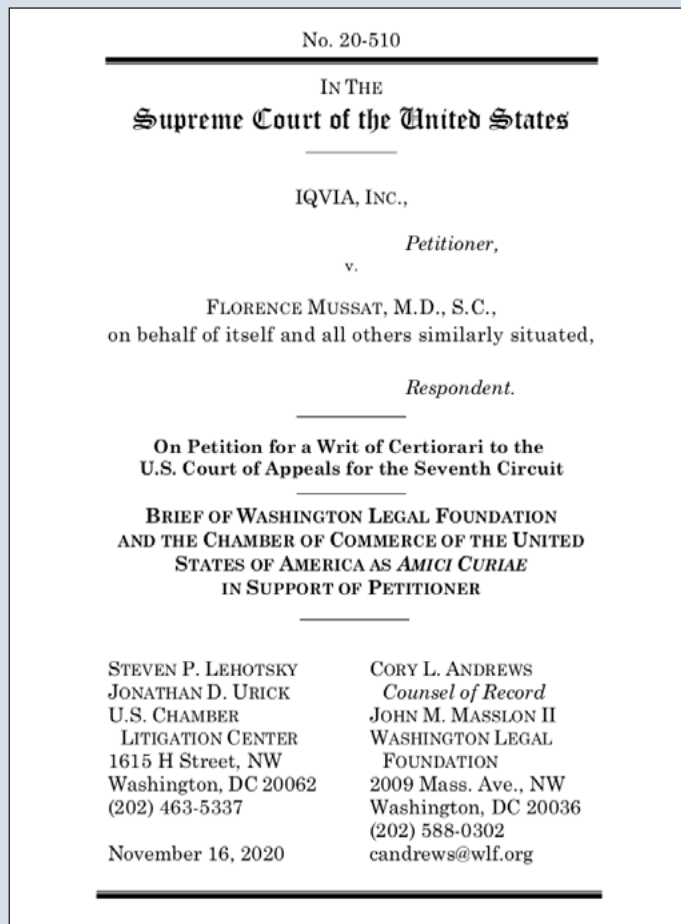
Protecting the Right to a Federal Forum

The federal officer removal statute authorizes removal from state court to federal court by any officer of the United States or “any person acting under that officer.” 28 U.S.C. § 1447(d) permits appellate review of a remand order denying removal in such cases. WLF argues that the history and purpose of federal removal manifest Congress’s intent to provide a broad right to meaningful appellate review.

AMG Capital Management v. FTC Limiting Judicial Remedies Under the FTC Act

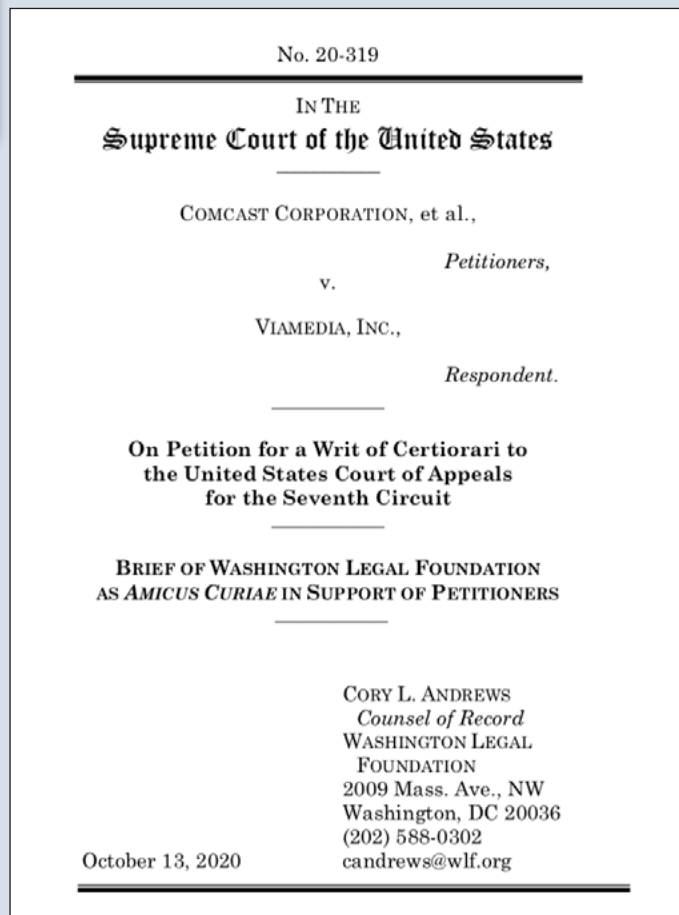
Section 13(b) of the FTC Act empowers the FTC to sue, in federal court, to obtain an injunction against deceptive trade practices. It does not authorize the FTC to seek other remedies, such as disgorgement or restitution. WLF argues that the statute should be enforced as written.





IQVIA v. Florence Mussat, MD, SC
Supporting Due Process Limits on Personal Jurisdiction

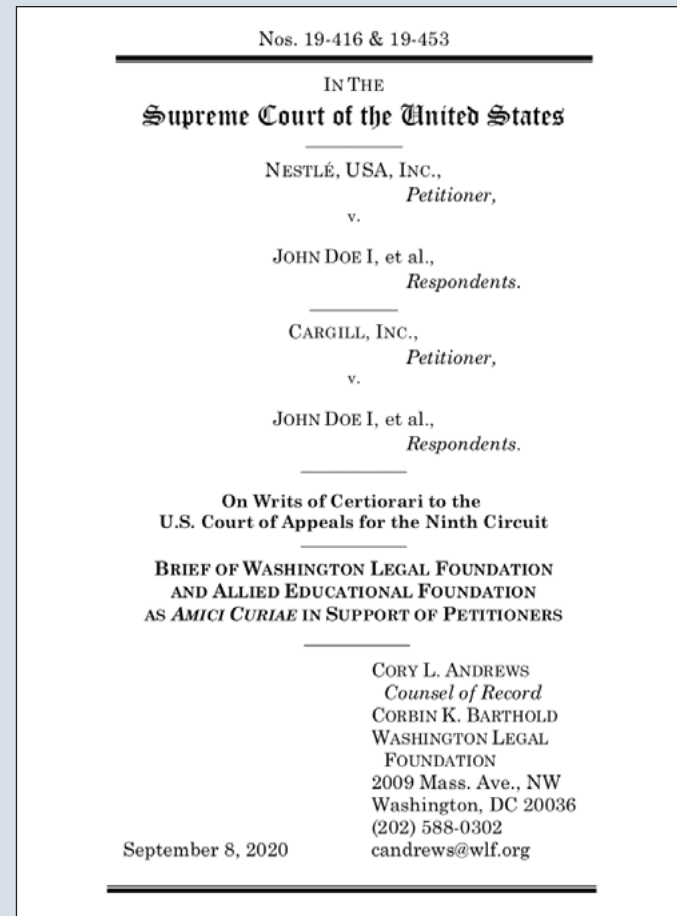
The Due Process Clause protects a nonresident defendant from being forced to defend a nationwide class action in a jurisdiction where it is not “at home.” WLF argues that unnamed plaintiffs should be required to sue in a forum in the State where their claims arose, not in a jurisdiction bearing no connection to those claims.



Comcast v. Viamedia

Opposing Refusal-to-Deal Antitrust Liability

Under federal antitrust law, a monopolist who ends an established and profitable course of dealing need only have a rational business reason for doing so. This is not a high bar. WLF argues that in our free-market system, a business—even an alleged monopolist—should be free to choose with whom it will transact.



Nestlé USA v. Doe; Cargill v. Doe

Limiting Liability Under the Alien Tort Statute

Activists and plaintiffs’ lawyers increasingly rely on an obscure 1789 law, the Alien Tort Statute, to sue multinational firms for their overseas activities. They claim that U.S.-based companies have aided and abetted human rights violations by foreign governments. WLF argues that allowing these suits to proceed disregards the Constitution’s crucial limits on a federal court’s ability to imply a new cause of action.

“Thanks so much for your amicus brief in *IQVIA v. Mussat*. WLF’s voice is so strong on these issues. Appreciate all that you do for free enterprise and the rule of law.”

Fortune 50 Senior Vice President and General Counsel

Litigation and Regulatory Reform

“WLF consistently submits top-flight briefs with distinct perspectives. Whenever I see a WLF brief, I know that it will be thoughtful and well written. And it is always a pleasure working with WLF’s lawyers on my own cases.”

Kannon K. Shanmugam
Chair of the Supreme Court and Appellate Practice Group
Paul, Weiss, Rifkind, Wharton & Garrison LLP

WLF participated in or obtained outcomes in 68 court cases and regulatory proceedings. Briefs and regulatory comments filed by WLF are available at WLF.org.

1-800 Contacts v. FTC

U.S. Court of Appeals for the Second Circuit
Combatting FTC antitrust overreach

Allen v. Cooper

U.S. Supreme Court
Urging the States to respect copyrights

Amazon.com v. Rittmann

U.S. Supreme Court
Cabining the Federal Arbitration Act’s “transportation exception”

AMG Capital Management v. FTC

U.S. Supreme Court
Limiting judicial remedies under the FTC Act

Association for Accessible Medicines v. Becerra

U.S. Court of Appeals for the Ninth Circuit
Supporting pharmaceutical patent-litigation settlements

AT&T Mobility v. McCardle

U.S. Supreme Court
Enforcing agreements to arbitrate

Atlantic Richfield v. Christian

U.S. Supreme Court
Supporting exclusivity of federal “Superfund” remedies

Banco Safra v. Samarco Mineração

U.S. Court of Appeals for the Second Circuit
Opposing “foreign-cubed” securities suits

BP plc v. Mayor & City Council of Baltimore

U.S. Supreme Court
Protecting the right to a federal forum

Burton v. Armstrong Containers

U.S. Court of Appeals for the Seventh Circuit
Supporting basic tort elements such as injury and causation

Cargill v. Doe I

U.S. Supreme Court
Limiting liability under the Alien Tort Statute

Cessna Aircraft Co. v. Garcia

Texas Supreme Court
Limiting personal jurisdiction over nonresident defendants

City of Oakland v. BP

U.S. Court of Appeals for the Ninth Circuit
Opposing judicial regulation of climate change

City of New York v. Chevron

U.S. Court of Appeals for the Second Circuit
Opposing judicial regulation of climate change

Comcast v. Mills

U.S. Court of Appeals for the First Circuit
Supporting federal preemption under the Federal Cable Act

Comcast v. NAAOM

U.S. Supreme Court
Requiring proof of causation in discrimination cases

Comcast v. Viamedia

U.S. Supreme Court
Opposing refusal-to-deal antitrust liability

Dannels v. BNSF Railway

Montana Supreme Court
Supporting federal preemption of state-law railroad-injury claims

Dunn v. Genzyme

Massachusetts Supreme Judicial Court
Supporting federal preemption under the Food Drug and Cosmetic Act

Facebook v. Duguid

U.S. Supreme Court
Supporting textualist principles of statutory interpretation

Facebook v. Patel

U.S. Supreme Court
Opposing certification of a class of uninjured plaintiffs

Financial Oversight and Management Bd. v. Aurelius Investment

U.S. Supreme Court
Urging strict adherence to the Appointments Clause

Ford Motor Co. v. Montana Eighth Judicial District

U.S. Supreme Court
Limiting personal jurisdiction over nonresident defendants

FTC v. Credit Bureau Center

U.S. Supreme Court
Limiting judicial remedies under the FTC Act

Glaxo Group v. DRIT

Delaware Supreme Court
Preserving freedom of contract

Goldman Sachs Group v. Arkansas Teacher Retirement System

U.S. Supreme Court
Opposing certification of an unwieldy nationwide class

Hammons v. Ethicon

Pennsylvania Supreme Court
Limiting personal jurisdiction over nonresident defendants

Ingham v. Johnson & Johnson

Supreme Court of Missouri
Limiting personal jurisdiction over nonresident defendants

In re Cigar Association of America

U.S. Court of Appeals for the Fourth Circuit
Opposing de facto administrative rulemaking by the judiciary

In re Packaged Tuna Antitrust Litigation

U.S. Court of Appeals for the Ninth Circuit
Opposing certification of an unwieldy nationwide class

IQVIA v. Florence Mussat, MD, SC
U.S. Supreme Court
Supporting due-process limits on personal jurisdiction

Latiolais v. Huntington Ingalls
U.S. Court of Appeals for the Fifth Circuit
Supporting federal contractors' removal rights

Liu v. SEC
U.S. Supreme Court
Limiting SEC's power to seek disgorgement remedies

Mallory v. Norfolk So. Railway
Pennsylvania Superior Court
Opposing personal jurisdiction based on business registration

Marion Healthcare v. Becton Dickinson & Co.
U.S. Court of Appeals for the Seventh Circuit
Urging adherence to antitrust law's "direct purchaser" rule

Merck & Co. v. HHS
U.S. Court of Appeals for the D.C. Circuit
Opposing government-compelled speech

Missouri Broadcasters Ass'n v. Taylor
U.S. Court of Appeals for the Eighth Circuit
Supporting First Amendment commercial speech rights

Murray v. American LaFrance
Pennsylvania Superior Court
Limiting personal jurisdiction over nonresident defendants

Nestlé USA v. Doe I
U.S. Supreme Court
Limiting liability under the Alien Tort Statute

Northern Plains Resource Council v. U.S. Army Corps
U.S. Court of Appeals for the Ninth Circuit
Opposing nationwide injunctions

Oracle America v. DOL
U.S. District Court for the District of Columbia
Opposing administrative agency overreach

OTO, LLC v. Kho
U.S. Supreme Court
Enforcing agreements to arbitrate

Prairie Rivers Network v. Dynegy Midwest Generation
U.S. Court of Appeals for the Seventh Circuit
Urging strict limits to federal jurisdiction under the Clean Water Act

Publishers Business Services v. FTC
U.S. Supreme Court
Limiting judicial remedies under the FTC Act

Pulse Network v. Visa
U.S. Court of Appeals for the Fifth Circuit
Enforcing antitrust standing requirements

Seila Law v. CFPB
U.S. Supreme Court
Challenging CFPB structure as unconstitutional

Stromberg v. Qualcomm
U.S. Court of Appeals for the Ninth Circuit
Opposing certification of an unwieldy nationwide class

Takeda Pharmaceutical Co. v. Painters Fund
U.S. Supreme Court
Requiring proximate causation in RICO cases

Thole v. U.S. Bank
U.S. Supreme Court
Enforcing limits on federal court standing

Tillage v. Comcast
U.S. Supreme Court
Enforcing agreements to arbitrate

UFCW Local 1500 v. AbbVie
U.S. Court of Appeals for the Seventh Circuit
Supporting pharmaceutical patent-litigation settlements

USAID v. Alliance for Open Society International
U.S. Supreme Court
Opposing government-compelled speech

U.S. ex rel. Yarberry v. Supervalu
U.S. Court of Appeals for the Seventh Circuit
Defending the False Claims Act's scienter requirement

Vogt v. State Farm Life Ins.
U.S. Court of Appeals for the Eighth Circuit
Opposing certification of "fail safe" classes

Wallace v. Grubhub Holdings
U.S. Court of Appeals for the Seventh Circuit
Cabining the Federal Arbitration Act's "transportation exception"

Walmart v. U.S. Drug Enforcement Agency
U.S. District Court for the Eastern District of Texas
Safeguarding the rule of law in federal regulatory actions

Walsh v. BASF Corp.
Pennsylvania Supreme Court
Opposing junk science in the courtroom

Waithaka v. Amazon.com
U.S. Court of Appeals for the First Circuit
Cabining the Federal Arbitration Act's "transportation exception"

Whole Foods Marketing Group v. Molock
U.S. Court of Appeals for the D.C. Circuit
Opposing nationwide class actions against nonresident defendants

Whelan v. A.O. Smith Corp.
New Jersey Supreme Court
Imposing reasonable limits on asbestos liability claims

In re Access to Pharmacogenomics Information
Food and Drug Administration
Opposing government restrictions on truthful speech

In re Draft Risk Evaluation for Asbestos
Environmental Protection Agency
Ensuring an unbiased peer-review process

In re FDA Amendments to "Intended Uses" Regulations
Food and Drug Administration
Opposing government restrictions on truthful speech

In re HHS Office of Inspector General Anti-Kickback Safe Harbors
Department of Health and Human Services
Reducing the regulatory burden on drug and device manufacturers

In re Mass. R. Civ. P. 51
Massachusetts Supreme Judicial Court
Ensuring procedural fairness to all parties

"WLF's briefs are must-reads for the Supreme Court bar and must-haves for parties. They aptly channel the perspective of many Justices. Not only that, WLF's briefs hit home with distinctive and engaging writing, sounding a compelling battle cry for freedom."

Sarah M. Harris
Partner
Williams & Connolly LLP

In re Membership on the Science Advisory Committee on Chemicals
Environmental Protection Agency
Ensuring an unbiased peer-review process

In re Proposed Formal Advisory Opinion No. 20-1
State Bar of Georgia
Safeguarding a company's privileged communications

In re Revisions to Fed. R. Civ. P. 702
Administrative Office of the United States Courts
Urging meaningful judicial gatekeeping for expert evidence

Publishing

WLF's Legal Studies Division publishes persuasive, expertly researched, and highly respected legal-policy papers focused on cutting-edge legal issues. These publications do more than inform government officials, businesses, attorneys, and the public about issues vital to the fundamental rights of every American — they tip the scale in favor of those rights.

Enterprising Legal Advocacy

Successfully advocating for a legal and regulatory environment that fosters free enterprise requires the timely dissemination and steady reinforcement of compelling arguments and ideas to those lawyers and jurists who shape the law. WLF established the Legal Studies Division in 1986 to deliver such well-informed critiques and principled analyses to decisionmakers in a variety of publication formats.

WLF's publications target highly selective legal policy-making audiences. We market our publications to:

- Federal and state judges and their clerks
- Members of Congress and their aides
- Regulatory agencies and executive branch attorneys
- State legislators, state attorneys general, and their aides
- Business leaders and corporate general counsel
- Law professors
- Influential legal journalists, bloggers, and media commentators

We archive our publications in our website's searchable online catalog. The shorter-format papers are also available on the Lexis/Nexis® database. Our authors supplement WLF's targeted distribution with their own extensive marketing efforts. Recipients use our publications as third-party educational tools in legal-policy campaigns, handouts at conferences, references in court briefs and law review articles, and instructive materials in internal corporate-compliance programs. Our publications are also routinely reprinted in specialized trade and professional journals.

Unlike a traditional "think tank" that supports a stable of in-house scholars, each year WLF solicits scores of independent legal professionals to author our publications on a pro bono basis. This allows WLF to tap relevant expertise and focus our resources on putting these intellectual tools in the right hands.

WLF has enlisted over 2,400 writers over the last four decades. Our authors are law firm partners and associates; corporate executives; in-house counsel; eminent legal scholars; and federal and state judges, regulators, and elected officials.

Over the past year, WLF released 48 papers authored by 73 legal professionals, including 44 first-time authors.

For a complete list of 2020 **publications** and topic areas covered, consult pages 21-24.

Thousands of decisionmakers and top legal minds across the country rely on our biweekly publications for the most insightful analysis of timely legal issues. Publications in print and online are marketed to expansive audiences ranging from business leaders to members of Congress and the media.

"The efforts Washington Legal Foundation so diligently and effectively undertakes help our Nation's lawyers and most importantly, judges, in preserving what is set forth on the front of the U.S. Supreme Court: 'Equal Justice Under Law.'"

*Victor E. Schwartz
Public Policy Practice Group Co-Chair
Shook, Hardy & Bacon LLP*

Counsel's Advisory
Announces urgent legal developments
that impact free enterprise.

Counsel's Advisory
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CONSUMER-FRAUD SUITS AGAINST PRODUCT RETAILERS A HARBINGER OF NEW PFAS CLASS-ACTION WAVE?
by Thomas R. Waskom

Three putative class actions recently filed in the Northern District of California—*DiGiacinto v. Albertsons Cos.*, *Ambrose v. Kroger Co.*, and *Nguyen v. Amazon.com, Inc.*—preview a new theory of consumer claims relating to per- and polyfluoroalkyl substances (PFAS). Rather than rely on alleged omissions or representations about health risks, the plaintiffs claim that they relied on marketing statements that indicated the products they purchased (“compostable” disposable dinnerware) were disposable and would completely degrade over time and that the presence of PFAS in the products means those marketing statements were false. That focus on the environmental persistence of PFAS, rather than the substances’ alleged health effects, marks a new approach to PFAS consumer class actions.

PFAS are a family of organic compounds with a carbon-fluorine bond, the strongest bond in nature, which enables them to repel both oil and water. This unique characteristic makes PFAS useful in a wide array of industries and applications, including stain and water-repellent fabric, chemical-and oil-resistant coatings, mist suppressants, food packaging materials, plastics, firefighting foam, solar panels, and many others. PFAS’s solubility and extreme durability also make the compounds highly persistent in the environment. It should be noted, however, that PFAS has also been linked to some health concerns, even though the scientific validity of those links is highly debated.

To date, PFAS litigation has focused almost exclusively on occupational exposure, environmental contamination, and personal exposure allegedly arising from that contamination. For example, the thousands of cases currently pending in an MDL in South Carolina relate to the use of PFAS in firefighting foam, thus resulting in groundwater contamination. A rare exception was a 2019 putative class action based on the alleged presence of PFAS in dental floss. The plaintiff’s claims arose under consumer protection statutes, but they were premised on the purported health risk posed by the dental floss, and the case was quickly dismissed.

DiGiacinto, *Ambrose*, and *Nguyen* represent a new avenue for PFAS litigation—consumer class actions based on the persistence of PFAS in the environment, rather than any purported health risk to the consumer. In all three cases, the plaintiffs allege that they bought a product based on the representation that after its disposal, the product would decompose in the environment over time. The plaintiffs claim that the purported presence of PFAS in the product renders that representation false. Each plaintiff asserts claims for breach of express warranty, unjust enrichment, and violation of California’s Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq. (under the unfair, unlawful, and fraudulent

Thomas R. Waskom is a Partner with Hunton Andrews Kurth in the firm’s Richmond, VA office.

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Legal Background
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TRIAL LAWYER GREED IN TIME OF NEED: THE COVID-19 TORT FEST AND HOW TO CURB IT
by Victor E. Schwartz

The COVID-19 pandemic has placed a vice grip on our nation. Tens of thousands have died from the disease and well over a million people have been rendered ill. Businesses have shut their doors and millions are unemployed because of ripple effects of the pandemic. One very small group of Americans, however, perceive the COVID-19 pandemic as a potentially substantial business development opportunity: Trial lawyers.

By no means do all trial lawyers see it that way, only a few. Those few, though, have significant power and resources. They can orchestrate litigation on a national scale and procure “experts” to target an even smaller group of judges in “plaintiff-friendly” jurisdictions to bring COVID-19-related tort claims (places referred to as Judicial Hellholes® by the American Tort Reform Association). In those areas, judges may eschew their role as gatekeepers, permitting unscientific expert testimony and unfounded COVID-19 injury claims to be presented to a jury. When the family of a person who died from COVID-19 or a person that became seriously ill testifies, some jurors’ sympathy may overwhelm the scientific facts, leading to large, unwarranted verdicts.

This LEGAL BACKGROUND will help distinguish the valid tort litigation from the baseless chaff. It will show how baseless claims can be defeated in litigation and through reasonable legislative reform.

The Gathering Storm of COVID-19 Tort Litigation

A wise plaintiff lawyer shared the following observation with me when it became clear that COVID-19 would be a pandemic: “Every pandemic death, every COVID-19 illness, and possibly well-grounded fear of illness is a potential lawsuit.”

Thus far, there has been a slow, but steady rain of COVID-19 tort lawsuits, but some plaintiffs’ lawyers have candidly shared that this is just an opening salvo. Those who have studied the history of tort litigation know that asbestos and other major liability onslaughts began with only a few cases. Shrewd plaintiffs’ lawyers want policymakers to believe that COVID-19 will not be a major litigation event. Unlike recent litigations such as Roundup®, where plaintiffs’ lawyers bombard television screens with advertising, they have engaged in little public solicitation of COVID-19 cases.

This is both wise and purposeful. Smart plaintiffs’ lawyers do not want to be seen as taking advantage of a national public health emergency. Also, unlike litigations involving a product, there is not one easy target to vilify. The cause of the harm in COVID-19 is not a product or human-made activity. It is nature, and nature cannot be sued and made to pay damages.

Nevertheless, mass advertising will ensue, as preparations have begun. Personal-injury law firm websites focusing on COVID-19 claims are already sprouting. There is a careful study of psychology occurring. The first messaging of the advertising campaign will seek to shore up in the minds of the public (i.e. potential jurors) that the suffering of a “victim” of COVID-19 is someone else’s fault. The second part will name targets who should bear responsibility. This paper identifies four potential targets, aside from lawsuits targeting healthcare providers:

Victor E. Schwartz co-chairs Shook, Hardy & Bacon LLP’s Washington, D.C.-based Public Policy Group. He is co-author of the most widely used torts casebook in the United States, PROSSER, WADE & SCHWARTZ’S TORTS: CASES & MATERIALS (14th ed. 2020).

Legal Opinion Letter
Vol. 29 No. 12 November 13, 2020

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FTC LACKS STATUTORY AUTHORITY TO LOWER HART-SCOTT-RODINO THRESHOLDS FOR BIG TECH ACQUISITIONS
by Steven Cernak

Government antitrust actions regarding Big Tech made huge headlines in the Fall of 2020. The Antitrust Subcommittee of the U.S. House Judiciary Committee completed its months-long investigation of Google, Apple, Facebook, and Amazon and issued a report in early October. Later that same month, the Department of Justice sued Google for monopolization. According to press reports, the FTC is near the close of its investigations of Facebook and Amazon.

But one other development might have slipped under your radar. FTC Chairman Joseph Simons updated the International Competition Network on the FTC Section 6(b) study of recent acquisitions by Alphabet (including Google), Amazon, Apple, Facebook, and Microsoft that were not reportable under the Hart-Scott-Rodino premerger notification system. As Simons described it, the study was “looking at the possible acquisition of nascent or potential competitors at transaction values below [HSR] filing thresholds.” He then suggested that “[o]ne potential outcome of this study is that we may decide to issue an additional special order requiring premerger filings for acquisitions by these companies at levels well below the normal statutory thresholds.” Prepared Remarks of Chairman Joseph Simons, Sept. 14, 2020, at https://www.ftc.gov/system/files/documents/public_statements/1580355/simons_icn_2020_digital_showcase_introduutory_remarks.pdf.

One problem with that suggestion: The FTC does not have the authority to change the premerger thresholds under HSR. While the FTC has broad discretion to make HSR rules—and sue to block or unwind non-reportable transactions—HSR’s language and legislative history make it clear that Congress did not delegate its authority to adjust HSR’s thresholds.

HSR Basics

The Hart-Scott-Rodino Antitrust Improvements Act of 1976, codified as 15 U.S.C. § 18a, established notification and waiting requirements for certain large acquisitions and mergers. The goal was to help the federal antitrust agencies identify transactions likely to violate the antitrust laws and sue to block their consummation. Congress established the original minimum size of the transactions subject to HSR’s reporting requirements in the original Act. In 2000, Congress adjusted the thresholds upwards, added a filing-fee requirement, and instituted a mechanism for automatic adjustments of the thresholds based on changes in the country’s gross national product.

Congress delegated to the FTC significant authority to design the HSR notification form and documentary-attachment requirements; define terms; exempt certain transactions unlikely to raise antitrust issues; and “prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section.” The FTC has used that delegated authority to establish rules and formal and informal interpretations advising businesses which transactions must be reported and in what format. The FTC’s adjustments to HSR’s requirements have rarely been challenged; however, one recent challenge, though unsuccessful, is instructive here.

Steven Cernak is a Partner with Bona Law PC in its Detroit, MI office who practiced antitrust law in-house with General Motors for over 20 years.

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by
Aaron D. Van Oort
Nicholas J. Nelson
Faegre Drinker Biddle & Reath LLP

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Christopher P. Gramling, Eli Lilly and Company
Matthew J. Hamilton, Mary Margaret Spence,
and Jason A. Kurtyka, Pepper Hamilton LLP

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Critical Legal Issues WORKING PAPER Series
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March 2020

**ADMISSIBILITY OF EXPERT TESTIMONY
MANAGEABLE GUIDANCE FOR JUDICIAL GATEKEEPING**

Evan M. Tager, Craig A. Woods,
Reginald R. Goeke, Daniel E. Jones,
Carl J. Summers, Matthew C. Sostrin,
and Jonathan S. Klein
Mayer Brown LLP

Foreword
The Honorable Paul S. Grewal
United States Magistrate Judge (ret.)
Vice President and Deputy General Counsel
Facebook, Inc.

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A WLF-Digested Opinion Vol. 4 No. 2 October 16, 2020

FEDERAL TRADE COMMISSION, *Appellant*
v.
ABB VIE INC., ET AL., *Appellees*.
Nos. 18-2621, 18-2748, and 18-2758, Decided September 30, 2020
U.S. Court of Appeals for the Third Circuit

Introduction:

The Federal Trade Commission (FTC) alleged that the owners of a patent for a testosterone therapy filed an unlawful sham patent lawsuit against the manufacturers of the product's generic copy. FTC also alleged that the parties' settlement of the litigation violated the Federal Trade Commission Act (FTC Act). The district court dismissed FTC's claims related to the patent settlement but found defendants liable for monopolization on the sham-litigation theory. The court ordered the parties to disgorge \$448 million under § 13(b) of the FTC Act.

The Third Circuit held that the district court should not have dismissed FTC's claims on the patent settlement's legality and incorrectly found one of the lawsuits to be a sham. The appeals court also held that the district court lacks authority under FTC Act § 13(b) to order disgorgement of "ill-gotten gains." The three-judge panel, per Judge Hardiman, rejected the conclusion of seven other circuit courts, refusing to read a restitution remedy into § 13(b), which by its text and structure only grants FTC the power to pursue injunctive relief.

Opinion Digest:

HARDIMAN, Circuit Judge:

The District Court ordered AbbVie and Besins to disgorge \$448 million in ill-gotten profits. It reasoned "[t]he weight of authority ... supports the conclusion that the grant of authority in section 13(b) to provide injunctive relief includes the full range of equitable remedies, including the power to order a defendant to disgorge illegally obtained funds." *AbbVie*, 329 F. Supp. 3d at 137 (citation omitted). It also said a contrary interpretation would "eviscerate the FTC Act" because a monopolist would "be able to retain its ill-gotten gains and simply face an injunction against future wrongdoing." *Id.*

Reviewing the District Court's interpretation de novo, see *Kaufman v. Allstate N.J. Ins. Co.*, 561 F.3d 144, 151 (3d Cir. 2009), we conclude it erred in ordering disgorgement because district courts lack the power to do so under Section 13(b).

"The FTC has multiple instruments in its toolbox to combat unfair methods of competition" and unfair or deceptive acts or practices. *FTC v. Shire ViroPharma, Inc.*, 917 F.3d 147, 155 (3d Cir. 2019). First is the FTC's "traditional enforcement tool," Section 5 of the FTC Act. *Id.* (citing 15 U.S.C. § 45(b)). That section

The Honorable Thomas M. Hardiman, who authored the majority opinion in *Federal Trade Commission v. Abb Vie Inc., et al.*, 2020 WL 5807873, had no role in WLF's selecting or editing this opinion for our CIRCULATING OPINION feature.

Legal Studies Publications

Administrative Law and Procedure

Circulating Opinion: *United States of America v. Nasir*
Digesting an opinion by The Honorable Stephanos Bibas, U.S. Court of Appeals for the Third Circuit

With *En Banc* Review, Tenth Circuit Foreshadows Potential Split with D.C. Circuit on *Chevron* Waiver
Jeremy J. Broggi, Wiley Rein LLP

Ninth Circuit Rejects Attempt to Revive Wildlife Refuge Rule Via Broad-Based Attack on the Congressional Review Act
Christopher Danley and Jeffrey Wood,
Baker Botts LLP

The High Court's *Benzene* Decision at 40: Will it Rise if *Chevron* Falls?
Christopher H. Marraro, BakerHostetler, and
Gary C. Marfin

Antitrust and Consumer Protection

FTC Lacks Statutory Authority to Lower Hart-Scott-Rodino Thresholds for Big Tech Acquisitions
Steven Cernak, Bona Law PC

Circulating Opinion: *Federal Trade Commission v. AbbVie, et al.*
Digesting a majority opinion by The Honorable Thomas M. Hardiman, U.S. Court of Appeals for the Third Circuit

Antitrust Law Must Remain Focused on Promoting Competition and Enhancing Consumer Welfare
Maureen K. Ohlhausen, Baker Botts LLP

Consumer-Fraud Suits Against Retailers a Harbinger of New PFAS Class-Action Wave?
Thomas R. Waskom, Hunton Andrews Kurth

California High Court Imperils Jury-Trial Right in State Civil Litigation with Unfair Competition Act Ruling
Jeffrey Margulies, Norton Rose Fulbright US LLP

WASHINGTON LEGAL FOUNDATION
September 25, 2020

On the Merits:

LESLIE RUTLEDGE, in her official capacity as
Attorney general of the State of Arkansas,
Petitioner,
v.
PHARMACEUTICAL CARE MANAGEMENT ASSOCIATION,
Respondent.
No. 18-540
United States Supreme Court

Question Presented: Whether Arkansas's Act 900, which regulates pharmacy benefit managers' reimbursement rates, is preempted by the Employee Retirement Income Security Act of 1974 ("ERISA").

Summary of the Case: Arkansas's Act 900 regulates pharmacy benefit managers ("PBMs")—third-party administrators hired to manage prescription-drug benefits on a plan's behalf. The Act requires PBMs to: (1) update the lists specifying the rates at which PBMs reimburse pharmacies for drugs prescribed to plan members; (2) maintain appeal procedures allowing pharmacies to challenge reimbursements they consider too low; and (3) grant certain appeals, increase the reimbursements at issue, and adjust the price list going forward.

The district court held that Act 900 has an impermissible "connection with" ERISA and is thus preempted. In affirming, the court of appeals considered itself "completely bound" by its earlier decision that an Iowa statute was preempted because it made "implicit reference" to ERISA by regulating PBMs that administer benefits for entities that can include ERISA plans. See *Pharmaceutical Care Mgmt. Ass'n v. Gerhart*, 852 F.3d 722, 728-31 (8th Cir. 2017) (invalidating Iowa PBM law).

Judgment for Respondent: ERISA Section 514(a) expressly preempts "any and all State laws" that "relate to" employee benefit plans. 29 U.S.C. § 1144(a). The Eighth Circuit held that this provision preempts an Arkansas statute regulating the administration of prescription-drug benefits on behalf of ERISA-governed benefit plans. We agree and affirm the judgment below.

In ERISA, Congress aimed to encourage formation of employee benefit plans by establishing a "uniform regulatory regime." *Aetna Health v. Davila*, 542 U.S. 200, 208 (2004). ERISA's broad express-preemption provision serves that goal by preventing a hodge-podge of state regulations that would

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On the Merits
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Unwinding Consummated Mergers—Just Because You Can Does Not Mean You Should
Steven Cernak, Bona Law PC

Antitrust Refusal-to-Deal Cases: At or Near, but Still not Beyond, the Outer Boundary of Section 2
Steven Cernak, Bona Law PC

Business Civil Liberties and Criminal Liability

OMB Guidance on Federal Enforcement Actions Demands Respect for Business Civil Liberties
Gregory A. Brower and Carrie E. Johnson, Brownstein Hyatt Farber Schreck, LLP

The Intersection of *Chevron* and Federal Prosecution: Courts Shouldn't Assist Agency Overcriminalization
John Lauro, Esq.

Capital Markets, Securities, and Corporate Governance

***Omnicare*, Five Years Later: Strategies for Securities Defense Lawyers' More Effective Use of the Decision**
Doug Greene, Ivory L. Bishop, Jr., Genevieve York-Erwin, and Albert Lin, BakerHostetler

Civil-Justice Reform

Pennsylvania Court Shoots Down Federal Tort Law as Beyond Congress's Commerce-Clause Power
Victor E. Schwartz and Christopher E. Appel, Shook, Hardy & Bacon LLP

Greater Transparency Can Expose the Illusion of Medical Receivable Funding in Tort Litigation
David I. Spector and Caitlin F. Saladrigas, Holland & Knight LLP

Follow Louisiana's Lead: The Case for Eliminating State Gag Rules on Motorists' Failure to Buckle Up
Lee Mickus, Evans Fears & Schuttert LLP

Trial Lawyer Greed in Time of Need: The COVID-19 Tort Fest and How to Curb It
Victor E. Schwartz, Shook, Hardy & Bacon LLP

Missouri Raises Bar for Punitive Damages and Consumer Protection Law Claims
Mark A. Behrens and Jennifer J. Artman, Shook, Hardy & Bacon LLP

A Victory for Civil Justice Reform: Tennessee Supreme Court's *McClay* Decision
Cary Silverman, Shook, Hardy & Bacon LLP

After Fifth Circuit Decision, Business Defendants Should Look Anew at Federal Officer Removal Statute
James M. Beck, Reed Smith, LLP

Early Assessment of Claims Can Help Reduce the MDL Tax
Christopher P. Gramling, Eli Lilly and Company and Matthew J. Hamilton, Mary Margaret Spence, and Jason A. Kurtyka, Pepper Hamilton LLP

Class-Action Litigation

Individualized Assessments of Employees Stopped a Class Action in its Tracks
Frank Cruz-Alvarez and Britta Stamps, Shook, Hardy & Bacon LLP

Commercial Speech

Sixth Circuit Limits "Commercial Speech" First Amendment Analysis To Content-Neutral Governmental Regulation
James M. Beck, Reed Smith LLP

FDA's First Amendment Blindspot Widens with Overzealous Interpretation of Modified-Risk Tobacco Regulation
Joel Kurtzberg, Adam Mintz, and John MacGregor, Cahill Gordon & Reindel LLP

The First Amendment and Food Marketing Litigation: Restoring the Legal Balance
Aaron D. Van Oort and Nicholas J. Nelson, Faegre Drinker Biddle & Reath LLP

Discovery Process

States Are Embracing Proportional Discovery, Moving into Alignment with Federal Rules
Mark A. Behrens and Christopher E. Appel, Shook, Hardy & Bacon LLP

Not-So-New E-Discovery Amendments Are Making a Lasting Impression
John J. Jablonski, Gerber Ciano Kelly Brady LLP

Employment Law

Oracle's Victory in Pay Discrimination Suit May Reshape OFCCP's Enforcement Practices
Jim Paretto and Michael J. Lotito, Littler Mendelsohn PC

Joint Employment: What Administrative Agencies' Rule Revisions Mean for Employers and Employees
Nathaniel M. Glasser, Stuart M. Gerson, Paul DeCamp, and Carly Baratt, Epstein Becker & Green, PC

California's New Independent Contractor Law, AB 5, Faces an Array of Legal and Legislative Challenges
Stephen T. Melnick, Littler Mendelson PC

Environmental Regulation and Enforcement

Unsettled Waters: Three Issues Clouding the Clean Water Act
Jim Wedeking, Sidley Austin LLP

On the Merits: *United States Forest Service v. Cowpasture River Preservation Association*
Lawson Fite, American Forest Research Council, and Sarah Harrington, Goldstein & Russell, PC

The 2020 Outlook for "PFAS" Chemical Litigation: An Expanding Target Zone
Jane C. Luxton and William J. Walsh, Lewis Brisbois

Expert Evidence and Junk Science

Maryland High Court Adopts *Daubert* Expert Evidence Standard
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Lee Mickus, Evans Fears & Schuttert LLP

Weight of the Evidence: A Lower Expert Evidence Standard Metastasizes in Federal Courts
Lawrence A. Kogan, Kogan Law Group, PC

Admissibility of Expert Testimony: Manageable Guidance for Judicial Gatekeeping
Evan M. Tager, Craig A. Woods, Reginald R. Goeke, Daniel E. Jones, Carl J. Summers, Matthew C. Sostrin, and Jonathan S. Klein, Mayer Brown LLP, with a foreword by The Honorable Paul S. Grewal, United States Magistrate Judge (ret.)

Federal Preemption

On the Merits: *Rutledge v. Pharmaceutical Care Management Association*
Helgi C. Walker, Matthew S. Rozen, and Max E. Schulman, Gibson, Dunn & Crutcher LLP, and Aphrodite Kokolis, Schiff Hardin LLP

Food, Drug, and Medical-Device Law

FDA's Ongoing Review of CBD and its Impact on Class Action Litigation

Rend Al-Mondhiry, Amin Talati Wasserman LLP, and Megan Olsen, Council for Responsible Nutrition

Foreign Corrupt Practices Act

DOJ and SEC's Updated Resource Guide: What FCPA Enforcement Targets Need to Know

Gregory A. Brower, Carrie E. Johnson, and Courtney E. Bartkus, Brownstein Hyatt Farber Schreck, LLP

General Jurisdiction and Standing to Sue

Federal Court Stalls Plaintiff Class Actions in Jeep Hacking Case for Lack of Standing

Gregory A. Brower and Samantha J. Reviglio, Brownstein Hyatt Farber Schreck, LLP

Circulating Opinion: *Flecha v. Medcredit Inc.*

Digesting a concurrence by The Honorable Andrew S. Oldham, U.S. Court of Appeals for the Fifth Circuit

Government Contracting and False Claims Act

Court Orders Federal Government to Produce Materiality-Related Discovery in False Claims Act Suit

Tirzah S. Lollar, Arnold & Porter

Insurance Law

Iowa Limits Medical Expense Damages to the Sums Actually Paid to a Plaintiff's Health Care Providers

Lee Mickus, Evans Fears & Schuttert LLP, and Marc Beltrame, Beltrame Law Firm, PLC

In *Scholle*, Colorado Supreme Court Should Clarify Collateral Source Rule's Application to Medical Expense Damages

H. Thomas Watson, Karen M. Bray, and Sarah E. Hamill, Horvitz & Levy LLP

Intellectual and Private Property Rights

USPTO Launches New Fast-Track Appeals Pilot Program

Dr. Michael A. Sartori and Matthew Welch, Baker Botts LLP

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Eastern District of Pennsylvania Finds Medical Devices Merit Comment K Exemption to Strict Products Liability

Shaila Rahman Diwan, Julia E. Romano, and Lisa M. Dwyer, King & Spalding LLP

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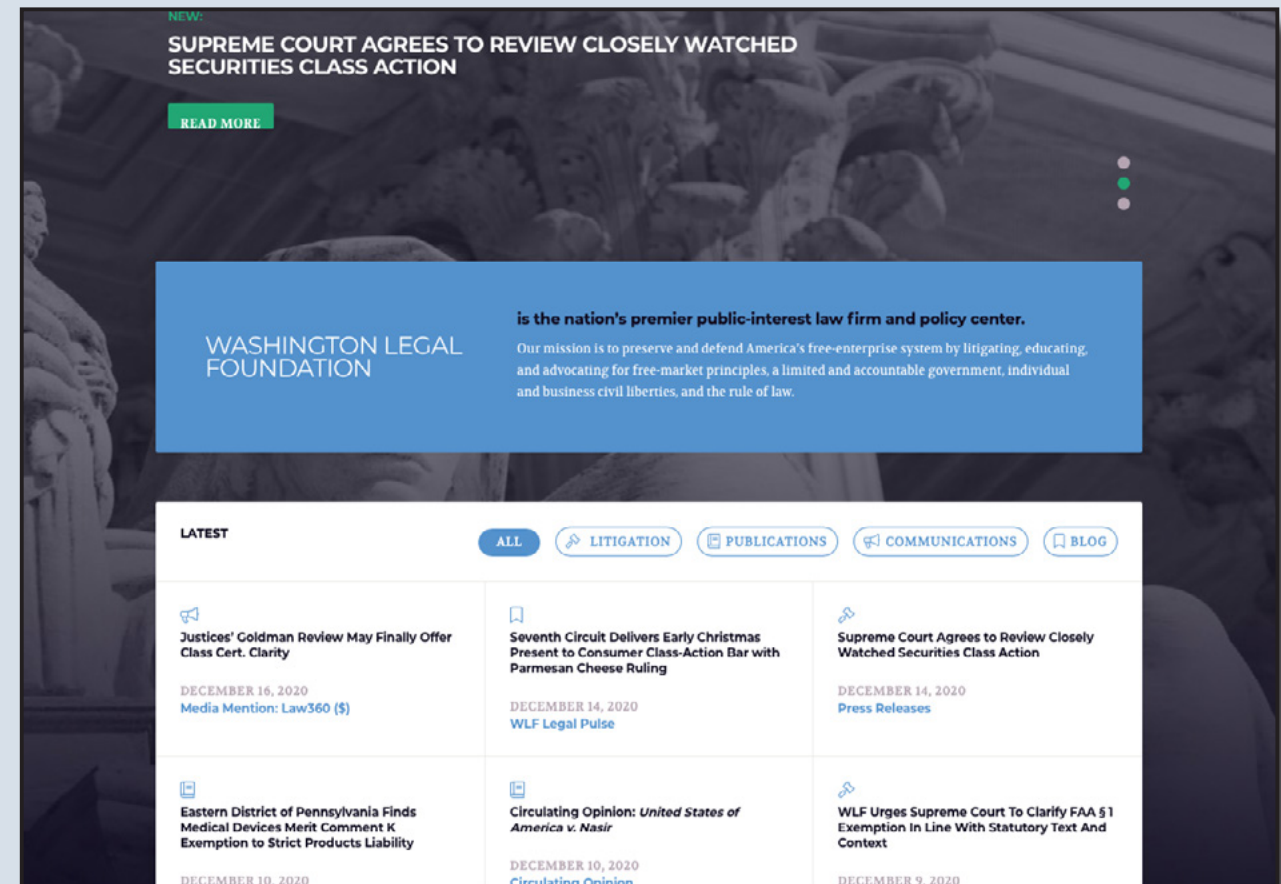
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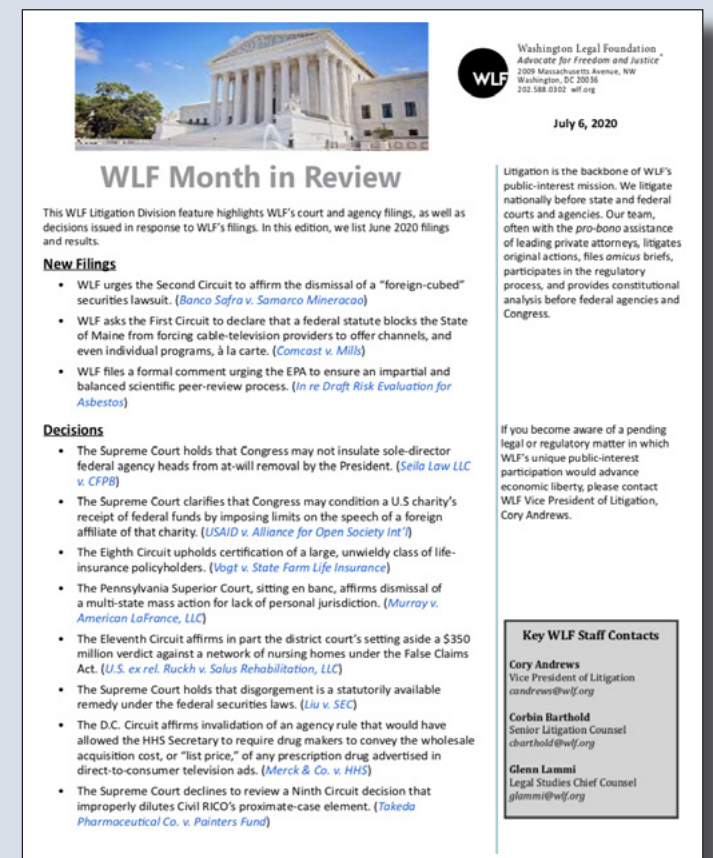
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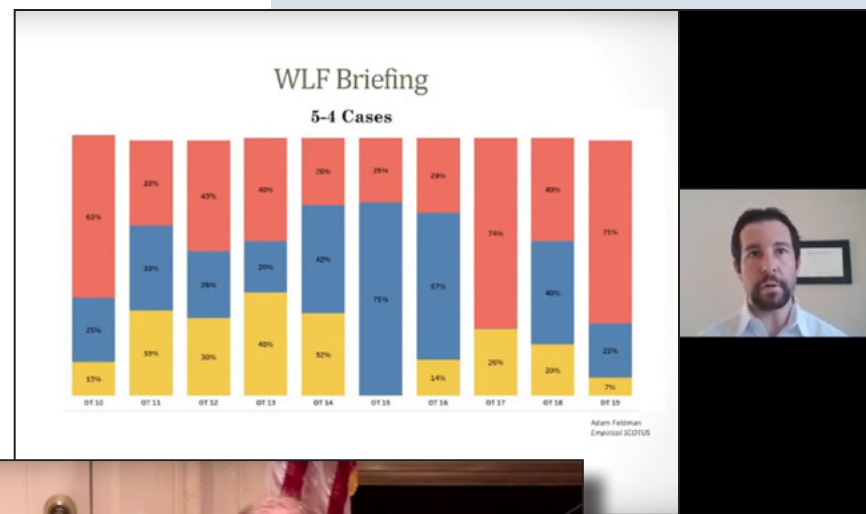
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Eldred (copyright term)	Thomas	5	2
	Roberts	3	2
Grokster (contributory infringement)	Solomayor	2	2
	Kagan	2	2
Golan (recapture of public domain)	Breyer	3	4
	Alito	2	3
Kirtsaeng (first sale)	Kavanaugh	0	1
	Gorsuch	0	4
Star Athletica (copyright of functional items)			
Public Resource (copyright of state legislative materials)			
Aereo (internet time shifting of TV)			
Plus three 10 th Circuit cases heard by Gorsuch			

Focus on NWP Program

- NGOs have made NWP program a target, particularly NWP 12
- Critical part of Section 404/Section 10 program
 - Streamlined permitting - 45 days vs. 264 days
 - Environmental benefits
 - Allows Corps to focus resources
 - Keeps permitting program from being overwhelmed - Authorizes 70,000 activities per year
- Program has been subject to a variety of challenges over the years



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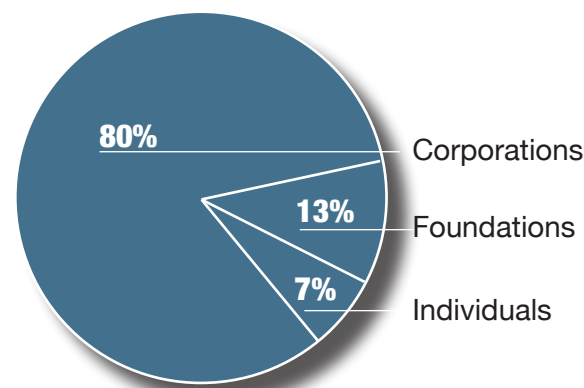
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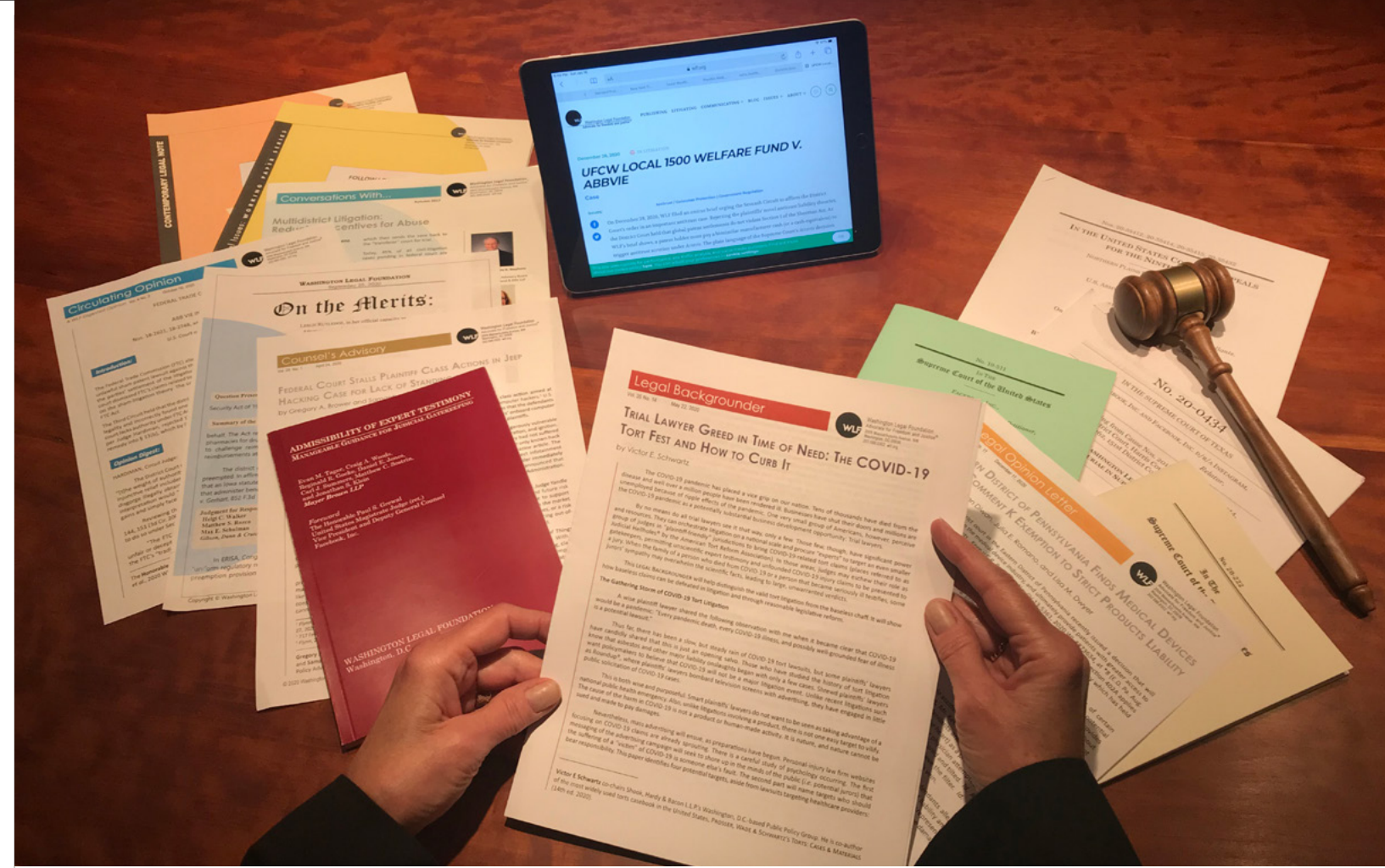
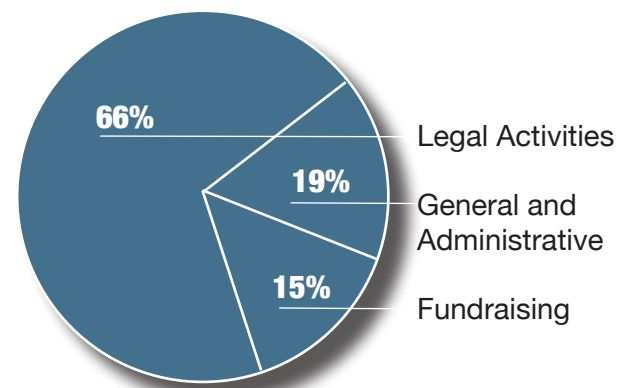
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